Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier	)	
Compensation Regime	)	CC Docket No. 01-92
	)	
	)	

COMMENTS OF BROADVIEW NETWORKS, NUVOX COMMUNICATIONS, ONE COMMUNICATIONS CORP., AND XO COMMUNICATIONS ON THE "PHANTOM TRAFFIC" PROPOSAL OF THE MISSOULA PLAN SUPPORTERS

BROADVIEW NETWORKS
NUVOX COMMUNICATIONS
ONE COMMUNICATIONS CORP. AND
XO COMMUNICATIONS, LLC

Brad E. Mutschelknaus
Edward A. Yorkgitis, Jr.
Thomas Cohen
KELLEY DRYE & WARREN LLP
3050 K Street, N.W., Suite 400
Washington, D.C. 20007
202-342-8400

Their Attorneys

December 7, 2006

TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY 3

II. THE SIZE OF ANY RESIDUAL "PHANTOM TRAFFIC" PROBLEM IS ALMOST ASSUREDLY NOT LARGE ENOUGH TO WARRANT THE SORT OF COMPLEX REGULATION PROPOSED BY THE MISSOULA PLAN'S SUPPORTERS 7

III. THE PROPOSAL, ALTHOUGH AN INTERIM SOLUTION, WOULD IMPOSE SIGNIFICANT COSTS ON CARRIERS AND WOULD FOSTER NEW FIELDS OF DISPUTE BETWEEN CARRIERS 9

IV. RATHER THAN ADOPT THE PROPOSAL, THE COMMISSION SHOULD ARTICULATE CLEAR CALL SIGNALING REQUIREMENTS 13

V. BEYOND MINIMAL CALL SIGNALING REQUIREMENTS, THE COMMISSION SHOULD MAKE CLEAR THAT ANY REMAINING "PHANTOM TRAFFIC" ISSUES WILL BE ADDRESSED THROUGH CARRIER-TO-CARRIER ARRANGEMENTS 17

VI. THE PROPOSAL'S SOLUTION FOR VOIP TRAFFIC IS FLAWED 19

VII. CONCLUSION 21

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
	)	

COMMENTS OF BROADVIEW NETWORKS, NUVOX COMMUNICATIONS, ONE COMMUNICATIONS CORP., AND XO COMMUNICATIONS ON THE "PHANTOM TRAFFIC" PROPOSAL OF THE MISSOULA PLAN SUPPORTERS

Broadview Networks, NuVox Communications, One Communications Corp., and XO Communications, Inc. (collectively, the "Joint CLEC Commenters"), hereby submit their comments in response to the Commission's November 8, 2006, public notice seeking comments on the proposal of the Missoula Plan supporters regarding so-called "phantom traffic," filed on November 6, 2006, in this docket (the "Proposal").[1] The Proposal assumes mandatory interim measures to address claimed problems with "phantom traffic," pending the later adoption of permanent requirements in this proceeding. As explained herein, the Proposal first inflates the nature and size of any "phantom traffic" problem well beyond reality and then articulates an overly regulatory solution.

The Joint CLEC Commenters encourage the Commission to identify and address any "phantom traffic" problems that exist, but it is important to keep in mind that it would be a gross overstatement to claim, as the Proposal's supporters do, that "phantom traffic" presents a pervasive problem requiring global regulatory intervention. Rather, any problems that might

1 *Comment Sought on Missoula Plan Phantom Traffic Interim Process and Call Detail Records Proposal*, Public Notice, CC Docket No. 01-92, DA No. 06-2294, rel. Nov. 8, 2006.

involve “phantom traffic” relate not to its existence, but to those entities that would exploit the phenomenon in an effort to evade intercarrier compensation. The Joint CLEC Commenters respectfully submit that the Commission can address this more limited set of concerns by clarifying and refining fundamental call signaling rules and establishing a framework based upon carrier-to-carrier negotiated contracts.

I. INTRODUCTION AND SUMMARY

As a threshold matter, the term "phantom traffic" is not inherently precise for policy purposes and must be examined with a finer lens to ascertain the extent to which “phantom traffic” might present issues warranting a Commission-imposed solution. If this scrutiny is bypassed, the tendency arises to characterize a larger universe of traffic in a way that applies to only a subset. This is a fundamental failure of the Proposal. While one can state generally that phantom traffic is traffic which excludes originating line signaling information and other details, it is improper to treat “phantom traffic” monolithically. The most significant mistake would be to assume, as the Proposal’s supporters have, that all telecommunications commonly labeled as "phantom traffic" involves some type of manipulation of signaling information by an originating or intermediate carrier to avoid paying the appropriate intercarrier compensation to the terminating carrier. This is unsubstantiated. It is critically important that the sponsors of the Proposal explain more precisely the circumstances in which “phantom traffic” merits regulatory intervention in order to avoid the imposition of overly broad and unnecessarily costly remedies on the industry, such as the Proposal. From the Joint CLEC Commenters’ perspective, only where entities seek to exploit or even generate phantom traffic so as to avoid intercarrier compensation should regulatory intervention even be considered.

In many cases, phantom traffic arises from technological limitations rather than nefarious intent.[2] For example, to the extent that traffic originates on a network supporting only in-band, multi-frequency ("MF") signaling, the traffic will not include sufficient information in the data stream to permit a terminating carrier to make a direct identification of the jurisdiction of the call based on calling party number. Such a deficiency is not due to a manipulation but instead results from technical limitations inherent in the signaling of the originating network. The "defects" in the resulting call signaling and records may be remedied by implementation of reasonable surrogates (*e.g.*, percentage local use factors or percentage interstate use factors) to allocate such traffic.[3] Further, as detailed below, some changes in the call signaling rules may reduce or eliminate much of the problem.

On the other hand, a portion of what some carriers may be labeling as "phantom traffic" may involve good faith differences of opinion between carriers regarding the regulatory treatment that is appropriate for certain traffic (e.g., whether certain types of IP-enabled traffic should be treated as local under the Commission's long-standing enhanced services exemption), in which case the way to remove the "phantom traffic" label from this type of traffic is via clarification of the applicable regulatory rules.

Significantly, in most cases today, phantom traffic does not require an externally imposed, generally applied solution (such as the Proposal). Carriers have, in numerous situations, already arrived at satisfactory methods of billing for phantom traffic. Most typically,

---

2 *See* Missoula Plan Supporters' Phantom Traffic Proposal, CC Docket 01-92, filed Nov. 6, 2006, at Appendix B ('a carrier may have encountered a legitimate technological limitation or the call may have originated from services to which North American Numbering Plan ("NANP") telephone numbers are not assigned'). *See also*, *ex parte* letter of Donna Epps, Vice President - Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket 01-92, dated Nov. 1, 2006 at 6, 10 ("phantom traffic" includes traffic lacking CPN due to technical limitations and non-geographic CPN) ("*Verizon Phantom Traffic Ex Parte*").

3 *Verizon Phantom Traffic Ex Parte* at 12.

in the Joint CLEC Commenters' experience, phantom traffic is addressed through contractual provisions, commonly those found in State-commission approved interconnection agreements ("ICAs"). In other situations, commercial agreements govern the treatment of phantom traffic exchanged between two carriers. In still other cases, carriers have not entered into an agreement and do not bill because the balance or volumes of traffic do not justify it.

The Proposal would impose new costs on all carriers that, upon closer examination, are not warranted and confer minimal if any benefit on many in the industry, costs that end user customers ultimately would be asked to bear. Rather than opting for this burdensome approach – which is premised on an overstatement of existing problems – the Commission should build upon existing regulatory obligations and the methods that have been used by carriers to resolve remaining concerns with "phantom traffic."

The Proposal allegedly sets forth an interim plan. Nonetheless, the Proposal is intended to be much more than a stop gap until a permanent solution can be crafted, as the Missoula Plan proponents' recommendations for a permanent plan includes many of the same elements as the interim plan, such as the ubiquitous generation and delivery of call detail records. Moreover, the Proposal appears tied into the adoption of the larger Missoula Plan. The Joint CLEC Commenters have urged rejection of the general Missoula Plan.[4] As stated in their opening comments on the Missoula Plan, however, the issue of how to address phantom traffic is already before the Commission and should be addressed without any tie-in to the Missoula Plan.[5] As detailed below in Sections IV and V, the Commission should issue an order expeditiously confirming and clarifying certain call signaling rules and should establish an obligation on all

4 *See* Comments of Broadview *et al.*, Docket No. 01-92, *passim* (filed Oct. 25, 2006) ("Joint CLEC Comments on the Missoula Plan").

5 *Id.* at 1.

carriers to enter into negotiations with other carriers, upon request, regarding traffic exchange in order to arrive at mutually-acceptable "phantom traffic" provisions.[6]

Specifically, the Commission should clarify and tighten basic call signaling rules as they relate to calling party number ("CPN") and automatic number identification ("ANI"). In addition, the Commission should make clear that contractual arrangements between local exchange carriers ("LECs") regarding local or tandem transited "phantom traffic" fall under Section 251(b)(5) and, in the case where one of the LECs is an incumbent, Section 251(c)(2) of the Communications Act of 1934, as amended ("the Act"). The Commission should enhance the basic statutory framework by establishing regulations that require all local exchange carriers *where they receive a request from another directly or indirectly connected telecommunications provider* to negotiate traffic exchange arrangements. Where such negotiations fail, the framework should provide that the parties may resort to State commission arbitration similar to that set forth in Section 252, to the extent it does not otherwise apply. The Joint CLEC Commenters acknowledge that ILECs might initiate such negotiations. Where a rural ILEC requests negotiations, then it should be deemed to have submitted to the obligations (vis-à-vis the other provider) of Sections 251(b)(5) and 251(c)(2) to the extent necessary to reach an agreement commensurate with the scope of the request.

6 Similarly, as the Joint CLEC Commenters noted in their initial comments on the Missoula Plan, the Commission should act to remove uncertainties regarding compensation for the exchange of VoIP traffic. *Id.* This matter is already pending in the *IP-Enabled Services* rulemaking (WC Docket No. 04-36) and several pending petitions for declaratory rulemaking and can and should be addressed separately and not subsumed into an order focused on adopting measures related to "phantom traffic."

II. THE SIZE OF ANY RESIDUAL "PHANTOM TRAFFIC" PROBLEM IS ALMOST ASSUREDLY NOT LARGE ENOUGH TO WARRANT THE SORT OF COMPLEX REGULATION PROPOSED BY THE MISSOULA PLAN'S SUPPORTERS

"Phantom traffic" is not a new phenomenon. For as long as traffic has been exchanged between carriers, there has been the potential (and commonly the reality) that some of the traffic does not contain originating line information. Most carriers recognize that due to technical limitations and other factors, most traffic exchanged without CPN is not evidence of bad intent. In the face of this potential (and reality) for traffic lacking CPN, carriers today employ a plethora of tariff and negotiated (or arbitrated) arrangements to determine appropriate charges for "phantom traffic" exchanged between them. Federal tariff provisions can be used to determine the extent to which traffic delivered for termination to a local exchange carrier without CPN will be treated as interstate switched access traffic, for purposes of intercarrier compensation. These tariffs, generally speaking, also address when traffic that is delivered *with CPN* is treated as interstate. State tariff provisions can determine the extent to which traffic that is not allocated to the interstate jurisdiction is subject to intrastate access charges. State approved interconnection agreements have commonly been used to complement such tariff provisions between ILECs subject to Sections 251(b) and (c) of the Act and other carriers with whom they interconnect, especially as they relate to Section 251(b)(5) non-access traffic and other traffic types not governed by tariff.[7] Typically, the foregoing arrangements treat traffic that is exchanged without CPN information as interstate *versus*

---

7 Where carriers are exchanging traffic but neither is an ILEC subject to Section 251(c), there is today something of a gap in the regulatory framework to the extent the traffic is not subject to federal or state tariffs because negotiations are not supported by the availability of mandatory arbitration. Many non-ILEC carriers choose to exchange traffic, whether directly or indirectly, through bill and keep arrangements – in which case "phantom traffic" is not of any particular concern.

intrastate or interexchange *versus* local traffic on the basis of some sort of proxy, often the use of jurisdictional factors.[8]

In light of the foregoing widespread arrangements, it is inappropriate to equate the size of any "phantom traffic" problem meriting potential regulatory intervention with an estimate, no matter how well-informed and well-founded, of the volume traffic exchanged between all carriers that meets some all-inclusive definition of "phantom traffic." Instead, the appropriate question is what percentage of "phantom traffic," broadly defined, is not covered by arrangements reached by carriers, whether contractual or otherwise. Even more pointedly, to what extent does the presence of "phantom traffic" represent an effort to deceive terminating carriers and avoid appropriate compensation? The supporters of the Proposal fail to address this question. In addition, other important inquiries – none of which the proponents of the Proposal take on – are whether this traffic has certain common characteristics, for example, whether the residual problem is typically present between carriers falling in particular categories. Until any remaining problems are adequately quantified, the Joint CLEC Commenters suggest that the Commission should avoid getting mired in fashioning any sort of intrusive regulatory relief.

---

8 Thus, as one example, traffic that does not have originating line information (*e.g.*, calling party number) will be treated as interstate versus intrastate by allocating percentages of such traffic in any given month to the one jurisdiction or the other on the basis of what percentage of the traffic that *does* contain originating line information that falls in one category versus the other. These percentages can change over time as traffic patterns on the two carriers' networks change, and there are typically provisions for such modifications. In some cases, where the traffic without originating line information exceeds a certain threshold percentage (also negotiated), the rules may change whereby *all of the traffic* above that threshold is treated as the type of traffic with the larger intercarrier compensation rate. In some cases, all of the traffic without the originating line information will be treated as traffic subject to the greater rate, including the traffic below the threshold.

III. THE PROPOSAL, ALTHOUGH AN INTERIM SOLUTION, WOULD IMPOSE SIGNIFICANT COSTS ON CARRIERS AND WOULD FOSTER NEW FIELDS OF DISPUTE BETWEEN CARRIERS

Many of the elements of the interim solution would require costly and significant system changes for carriers. Changes of this magnitude for an interim measure could not be justified and would pre-judge consideration of permanent measures in many key respects. Moreover, because the Proposal mischaracterizes and exaggerates the extent of any problems, the regulatory response championed in the Proposal is disproportionate and wholly unfit for any interim solution. The Proposal should not be adopted as an interim measure.

Of most significance, the Proposal would require that transit service providers ("TSPs") and local wholesale switching providers ("LWSPs")[9] to develop significant system changes to generate call detail records ("CDRs") on all traffic for which they provide intermediate switching or transport functions and deliver the records to all terminating carriers. In fact, the Proposal's supporters advocate that affected carriers implement a Uniform Process for the Creation and Exchange of Call Detail Records ("UP"). According to the UP, TSPs and LWSPs would be required to develop and distribute CDRs to terminating carriers in a standard format.[10]

---

9 The Proposal describes an LWSP as a carrier not financially responsible for paying intercarrier compensation to the terminating carrier (*i.e.,* the carrier serving the called party) that serves another carrier by providing wholesale switching functionality that allows that carrier to provide local exchange and exchange access services. TSPs are carriers that provide a switched transport service to effectuate indirect interconnection between two carriers. It is not entirely clear under the Proposal what the difference between LWSPs and TSPs is, as neither has a financial responsibility to the terminating carrier, and (by providing wholesale switching functionality) both serve the carrier who does have such responsibility. By maintaining the distinction, the Proposal foresees that there may be two or more local exchange carriers providing TSP and LWS functions between the originating and terminating carrier, a scenario which is certainly becoming frequent within the industry. *See* Proposal at 8, section III.B.8.c (requiring LWSPs to send call detail records to TSPs and other LWSPs in the call path as part of the interim solution).

10 *See* Proposal at 9-10. A transition period is provided for carriers not already generating such records, up to 270 days. *Id.* at 7-8.

The obligations to develop the systems changes needed to create and distribute CDRs in this standard format would fall upon any carrier that provides Transit Service or Local Wholesale Service today or in the future. Although the Proposal suggests that its provisions are merely "default provisions," and carriers are free to negotiate other arrangements, if an LWSP fails to negotiate all open issues with *just one downstream carrier* involved in the termination of its LWS traffic, it bears the full burden of development of these capabilities and must recover those costs.[11] The Joint CLEC Commenters estimate that developing the ability to comply with the LWSP obligations under the so-called interim solution would cost a carrier without that ability on the order of hundreds of thousands, if not millions, of dollars for each affected carrier.

Not only are the costs imposed on transit providers and LWSPs unnecessary, the Proposal would impose excessive costs on originating and terminating carriers. The Joint CLEC Commenters noted in their initial comments on the Missoula Plan that the default charge of $0.0025 per minute for Tandem Transit Service proposed by the Plan's supporters were far in excess of the cost-based rates that State commissions had developed after detailed examination of ILEC-provided cost studies – on the order of 200-250 % higher.[12] With the filing of the Proposal, it has become clearer – although no more justified – why such high Tandem Transit Service charges were proposed in the Missoula Plan.[13]

Even the explanation that CDR costs under the Missoula Plan would be recovered from the Tandem Transit Service charge does not serve to justify the high rates. Neither the

---

11 The ability to negotiate with ILECs in the context of specific default provisions is largely an illusion, however, as ILECs will typically refuse to negotiate with CLECs unaffiliated with a major ILEC more or less than the regulatory obligations that have been imposed. The Proposal's default provisions represent such regulatory obligations.

12 Joint CLEC Comments on the Missoula Plan at 63-65.

13 The Proposal makes clear that no charges can be assessed for the creation of Call Detail Records because those costs are incorporated into the charges for Tandem Transit Service. Proposal at 6, section II.F.

Proposal, nor the Missoula Plan, demonstrate what the actual costs of generating and delivering the CDRs would be on a per call, incremental basis. Moreover, CDRs often would be unwanted and unnecessary (because of other arrangements to deal with "phantom traffic" and intercarrier compensation, as explained above). Allowing these costs to be recovered in a universally applicable Tandem Transit Service charge would be eminently unfair to carriers that do not use the CDRs to address "phantom traffic." Further, the Proposal imposes the costs of the CDRs on the wrong party. The Terminating Carrier entitled to charge for intercarrier compensation is the party that putatively benefits from the generation and delivery of the CDRs. If any party should compensate the TSP or LWSP for the creation and delivery of the records, it is the Terminating Carrier – and the charge for Tandem Transit Service should be reduced accordingly.

Having said that, the Joint CLEC Commenters wish to stress unconditionally that, under any scenario, regulatory or contractual, terminating carriers should never be required to accept and receive CDRs created by a tandem transit provider, an LSWP, or any other upstream carrier that the terminating carrier has not requested. **Where terminating carriers determine such call records are unnecessary or do not provide a benefit, it is simply inefficient to require that they be created and delivered.** Concomitantly, terminating carriers (or originating carriers, for that matter) should not be charged for the creation of such call records unless the terminating carrier affirmatively requests them.[14]

---

[14] Under the Proposal, in some circumstances, the TSP or LWSP may charge something additional for CDR generation and delivery, and the charge is assessed against the Terminating Carrier. Proposal at Section II.F.2.c. Despite its fundamental faults, as described above, at least this part of the Proposal recognizes that the Terminating Carrier is the entity that should pay for CDRs.

Furthermore, where CDRs are requested, such rates should be cost-based, like the underlying local tandem transit service itself with which it is associated.[15] The absurdity of the proposed rate for the generation and delivery of the CDRs is that it exceeds what, in almost all circumstances, would be a reasonable call termination rate by a factor of two or three. Any reasonable pair of originating and terminating carriers that would negotiate with a tandem transit service provider, rather than requiring CDRs and incurring needless expenses, would be expected to instead opt for some other arrangement that bypasses the need for the call detail record charge.

Adoption of the Proposal would impose on carriers additional costs beyond the system changes and CDR charges that are not justified given the contract-based solutions being used today. Indeed, by mandating a default solution applicable to all terminating, originating, and intermediate carriers, the Proposal would require carriers to renegotiate existing contracts and implement new amendments, a process entailing additional expense, often unnecessary in light of current arrangements. These additional indirect costs further clarify the unreasonableness of the Proposal.

Finally, by upsetting the *status quo*, the proposed interim solution would likely create new disputes between carriers. Carriers may be likely to dispute whether their contracts need to be amended under change of law provisions, especially if one of the carriers sees an opportunity to gain from the outlandish charges for CDRs. Disputes are also likely to arise about the adequacy of the CDRs. By moving from a contract-based system driven primarily by the use of jurisdictional factors to address phantom traffic, where the CDRs prove to be inadequate,

---

15 In fact, the Proposal would make generation of the CDRs an inherent part of providing Tandem Transit Service. The Joint CLEC Commenters submit that the Commission should not set a rate for CDR generation and delivery. The rate should be negotiated (where the terminating carrier chooses to receive such call records) and the rate, if the parties cannot agree, should be set by the State commissions. *See* Joint CLEC Comments on the Missoula Plan at 65.

carriers operating under the Proposal, ironically, may be very well driven back, *ex post facto*, to the use of a surrogate – such as factors – to resolve such disputes.

IV. RATHER THAN ADOPT THE PROPOSAL, THE COMMISSION SHOULD ARTICULATE CLEAR CALL SIGNALING REQUIREMENTS

In their comments on the Missoula Plan, the Joint CLEC Commenters observed that many of the remaining arbitrage opportunities today could be resolved by addressing any problems with "phantom traffic" in a separate order. In particular, it is vital that there be a method to determine the jurisdictional nature of traffic. No methodology will be perfect. The question is whether the method utilized is adequate in light of the actual problems to minimize the opportunities for gaming the system, which is of paramount performance.

The Joint CLEC Commenters believe that the Commission should complement its current rules, which require carriers using SS7 signaling only to provide calling party number ("CPN") with interstate calls and to pass along CPN *if* it is received from the upstream carrier.[16] This minimal requirement, which was adopted in 1995, was adopted not out of a concern for more accurate intercarrier-billing. Instead, the Commission adopted the existing requirements to support caller ID services and, conversely, the desires of some customers to block the transmission of CPN to all or certain end user called parties. In light of the current concerns about "phantom traffic" being exploited to evade intercarrier compensation, the Commission should update its call signaling rules.

First, the Commission should require all telecommunications providers to generate and deliver some form of calling party signaling information with each call. Those carriers which use SS7 should be required to populate the SS7 signaling fields with the "true" calling party number. "True CPN" is the ten digit telephone number assigned to the end user

[16] *See* 47 C.F.R. §§ 64.1601(a) and (c).

initiating the communication, rather than any intermediate switching or patch point, such as a calling card platform. Arguably, the current rules already provide this, but reiteration and strengthening of the language would be beneficial and avoid further exploitation of any loopholes in the current requirement perceived by those seeking to evade full payment of intercarrier compensation charges.

The current rules impose an obligation regarding originating line information on SS7-capable carriers only. The Commission should take this opportunity to address carriers, although they may be increasingly fewer in number, that still use MF signaling. While these carriers cannot generate CPN, they can provide Automatic Number Identification ("ANI"), which is a reasonable surrogate for CPN where it is not technically feasible to include CPN. The Commission should require carriers using MF signaling to provide the ANI of the end user placing the call.

Second, the Commission should reiterate that all carriers employing SS7 must pass along CPN and other jurisdictional-related signaling information *that is received*, such as the JIP, without alteration. This information cannot be stripped or changed, unless it is permissible under industry standards.[17]

Third, as a general matter, the CPN and called party number should be used to determine, for intercarrier compensation purposes, the jurisdictional nature of the call. While the clarification of the call signaling rules should cut down on the amount of traffic that is exchanged without CPN information, there are certain inherent limitations in this proposal that must be accepted, due to the usage of non-geographic numbers. These include some VoIP applications

---

[17] While the charge number field legitimately can be populated by an intermediate carrier, or potentially even altered or replaced (as discussed below), this should only be permitted consistent with industry standards.

where subscribers to such services have itinerant numbers, roaming CMRS providers, and non-geographic wireline numbers (such as foreign exchange or vNXX services). As a general matter, the expense of determining the geographic location of VoIP and CMRS calls, in those instances where the number is not reflective of the actual location of the subscriber, outweighs any perceived potential harm arising from the administratively simple and inexpensive method of determining jurisdiction based upon a comparison of CPN with called party number. Moreover, as appropriate, compensation for such calls can be provided through intercarrier agreement.[18]

In keeping with the long-standing treatment of foreign exchange traffic as local traffic based upon the NPA-NXX of the foreign exchange line – end users with numbers from the same NPA-NXX have always been able to place local calls to such numbers, regardless of the physical location of the foreign exchange number subscriber, and vice versa. Since the calls are rated based upon the NPA-NXXs, they should also be treated for reciprocal compensation on the same basis.

When updating the call signaling rules, special consideration must be given to the charge number ("CN") field. Comments and *ex parte* letters filed in this proceeding by several ILECs contend that the charge number field should be treated in the same vein as the CPN, such that originating carriers must populate the CN (if at all) with the calling party's billing telephone number ("BTN") and the CN (or the empty CN field) must be passed along without alteration. The Joint CLEC Commenters question the need for this type of requirement, particularly where the obligation to use the "true" CPN is made clear. In that context, the requirement that CN also

---

18 As described in Section VII below, until such time, if ever, as the Commission alters or eliminates the enhanced services access charge exemption, VoIP-PSTN calls are to be treated as local business calls, so there is no real need to compare the CPN versus the called party number for such traffic. VoIP-originated (net protocol conversion) traffic, for intercarrier compensation purposes in the terminating market, should be treated as local traffic subject to reciprocal compensation and tandem transit arrangements.

be used to determine the origin of a call is not only redundant, but it frustrates the ability of intermediate carriers to use the CN field to effectuate their own wholesale billing to other carrier or provider customers in a way that, by not altering, modifying, or replacing the CPN (or the JIP), *would not mask the jurisdictional nature of the call* based upon CPN.

As one example, under the Commission's current rules, net protocol conversion traffic (*i.e.,* VoIP-to-PSTN traffic) is enhanced and not subject to access charges. Thus, under the current regime, traffic that originates in IP protocol at the calling customer's premises and then is converted for completion to the called party is converted to TDM protocol, before being handed off to the public switched telephone network, is to be treated as local and not subject to access charges. A provider of such VoIP telephony might transport the call to the terminating market where it hands the traffic off to a local exchange carrier using local business lines (per the enhanced service provider exemption), such as a PRI. The intermediate carrier's switch, in order to bill properly for the PRIs, might populate the CN field with the BTN assigned to the PRI. That carrier would then complete the call itself, if the called party is its subscriber, or hand off the traffic to another provider, which either serves the called party or provides a tandem transiting function. The call signaling information as received by the terminating carrier, under the rules proposed here, would reflect the CPN assigned to the originating subscriber. Once generated by the originating provider, this could not be altered by downstream carriers, and its presence (along with the JIP, if present) would enable terminating carriers to challenge the treatment of the traffic as local, should they feel a challenge is justified. Notably, the change in the CN field effectuated by the switching facility of the intermediate carrier that is providing the PRIs to the enhanced service provider would be legitimate and not upset the terminating carrier's rights. Because the CPN is not altered, the ability to determine jurisdiction of the call based on the calling party's location, if applicable, is fully preserved.

V. BEYOND MINIMAL CALL SIGNALING REQUIREMENTS, THE COMMISSION SHOULD MAKE CLEAR THAT ANY REMAINING "PHANTOM TRAFFIC" ISSUES WILL BE ADDRESSED THROUGH CARRIER-TO-CARRIER ARRANGEMENTS

The Proposal attempts to impose universal obligations on carriers, whether or not they are currently addressing phantom traffic questions successfully through a combination of tariffs and other arrangements, including ICAs and commercial agreements. Rather than impose a new blanket of regulation in this area, the Joint CLEC Commenters submit that the Commission should reject the Proposal and make clear that existing agreements governing phantom traffic will be unaffected.[19] Negotiated arrangements are superior to general regulation because, in any given interconnection relationship, it may be difficult to determine *a priori* what an appropriate arrangement is. The parties should be free to work this out on their own through negotiated solutions. Reasonable solutions may depend upon a variety of factors: what is the volume of traffic that is exchanged between the two carriers? Is that volume expected to increase or decrease? Is the traffic exchanged directly or indirectly or a combination of the two? What sort of interconnection trunking arrangements are efficient or otherwise make sense given the traffic exchanged between the parties? Are there historic traffic patterns to draw upon? These and other considerations may make a solution appropriate in one interconnection arrangement and inappropriate in another. The Proposal ignores this distinct likelihood.

[19] In addition, any tariff provisions regarding the allocation of traffic delivered without CPN to the interstate jurisdiction and in the access service basket should remain in place as well (unless they are otherwise and independently unjust, unreasonable, or discriminatory).

As for those situations where carriers exchange traffic, directly or indirectly, but have not negotiated an agreement, the Commission should consider establishing a framework, building upon its *T-Mobile* case in this docket facilitating negotiation (and if necessary, arbitration) of contracts governing the exchange of traffic between wireless and wireline carriers.[20] Specifically, the Commission may make available a process whereby a carrier has an obligation, *upon request from another carrier with whom it exchanges or will exchange traffic otherwise subject to Section 251(b)(5)*, to negotiate in good faith provisions governing the determination of the jurisdiction and nature of the traffic, interconnection architectures, and intercarrier compensation. If negotiations fail, state arbitration should be available to resolve the open issues (or, upon mutual agreement, commercial arbitration).

However, at the same time, the Commission should emphasize that a formal agreement or even negotiations would never be mandated absent a request by one of the two carriers exchanging traffic. There may be a variety of reasons why the carriers would not choose to attempt to negotiate, or desire, a formal agreement. For example, they may believe the traffic exchanged with the other carrier is in balance or, if not, the traffic volumes are too small to merit formal agreements. Carriers striving to compete in local markets should not be forced to enter into agreements where neither party feels the effort and expense of resources is justified. While making clear the limits of carrier obligations to negotiate and enter into contracts, as described herein, the Commission should also emphasize the obligation of both directly and indirectly interconnected carriers to exchange traffic regardless of whether a formal arrangement exists.

20 Developing a Unified Intercarrier Compensation Regime, T-Mobile *et al.* Petition for Declaratory Ruling Regarding Incumbent ILEC Wireless Termination Tariffs, *Declaratory Ruling and Report and Order*, 200 FCC Rcd 4855 (2005).

In adopting a regulatory framework as outlined above, the Commission should clarify that a rural ILEC otherwise not subject to Section 251(b) or (c), pursuant to Section 251(f), that makes a request of another local exchange carrier for such an arrangement, subjects itself to ILEC obligations under Sections 251(b) and (c) consistent with the scope of its request and the extent to which that request implicates the subject matter of those statutory provisions. Some rural carriers may balk at this notion, but they cannot be allowed to have their cake and eat it, too. Any LEC with which they make a request for such an agreement, for example, will be subject to Section 251(b)(5) regarding non-access traffic. There is no policy reason that, when an otherwise exempt rural ILEC makes a request of another LEC for a traffic exchange agreement that, by its nature, falls within the scope of those statutory provisions, the substantive standards that would apply to a LEC-LEC agreement do not govern.

VI. THE PROPOSAL'S SOLUTION FOR VOIP TRAFFIC IS FLAWED

The Proposal advocates a process for identifying VoIP-originated traffic designed to ascertain "[w]hether to apply interstate access charges or reciprocal compensation charged to such traffic.[21] The Proposal puts the cart before the horse by assuming that access charges apply to VoIP-originated traffic when it is non-local. The Commission has never reached this determination. This issue of how to treat VoIP traffic is squarely teed up in a variety of other proceedings, as outlined in the Joint CLEC Commenters initial filing on the Missoula Plan.[22] The Commission should not resolve this issue in the context of adopting measures to address phantom traffic. Indeed, resolving VoIP-PSTN intercarrier compensation traffic issues is not a prerequisite to refining and strengthening the call signaling requirements, in the manner

[21] Proposal, Appendix B.

[22] Joint CLEC Comments on the Missoula Plan at 82 (referencing the *IP-Enabled Services* rulemaking proceed (WC Docket No. 04-36) and pending petitions for declaratory ruling (WC Dockets No. 05-276 and 05-283)).

described above Any phantom traffic solution should be rejected to the extent that it assumes access charges apply to some or all VoIP-originated *traffic until the Commission addresses that question squarely.* Moreover, as the Joint CLEC Commenters have said on numerous occasions, any Commission determination to apply access charges should be *prospective* only in light of the current applicability of the enhanced services access charge exemption to net protocol conversion traffic, such as VoIP-PSTN traffic.[23]

Once the Commission makes a determination regarding the *prospective* treatment of VoIP-PSTN traffic, it may be worth considering whether any special measures are necessary depending upon the details of that decision. The Joint CLEC Commenters submit that the Commission should take up that issue, if necessary, in the same proceeding (*i.e.,* the *IP-Enabled Services* rulemaking) in which it decides the prospective treatment of VoIP-originated traffic. The following discussion is offered solely for purposes of illustrating the types of considerations the Commission should take into account, and should not be interpreted as a suggestion that these issues be decided here. As a general matter, the Joint CLEC Commenters believe that the same principles outlined above could be applied to VoIP-PSTN traffic. Thus, for example, if the Commission's determination regarding intercarrier compensation for VoIP-PSTN traffic renders relevant the identification of such traffic that originates and terminates in the same state or within the same local calling area (based on originating and called party telephone numbers), then the VoIP provider could be required to provide CPN with each call that it originates that reflects the "home" area of the VoIP subscriber. The other call signaling rules outlined above could also be applied. Consequently, the terminating carrier would be able to compare the CPN information

---

23 *See, In the Matter of Petition for Declaratory Ruling Regarding Self-Certification of IP-Originating VoIP Traffic*, WC Docket No. 05-283, Reply Comments of NuVox Communications, XO Communications, and Xspedius Communications, Inc., filed Jan. 11, 2006 at 4-8.

with the called party number (and examine the JIP, if present) to determine jurisdiction.[24] In those cases where CPN is not provided with a VoIP-originated call,[25] factors or other arrangements reached between the carriers involved could be used to allocate the CPN-less traffic to different categories. Indeed, the Proposal itself advocates the use of factors in similar situations.[26]

VII. CONCLUSION

For the foregoing reasons, the Proposal should not be adopted. But the Commission should address certain matters in separate orders to minimize the opportunity for carriers and other providers to exploit "phantom traffic" in a way that seeks to avoid payment of appropriate intercarrier compensation. Specifically, the Commission should take the less burdensome and more targeted steps of refining the call

---

24 The Joint CLEC Commenters recognize that VoIP traffic can with some frequency be associated with telephone numbers that are disconnected from the geographic location of the VoIP subscriber. While there may be methods that exist to ascertain the location of the subscriber, it may not be administratively efficient or cost-effective at this time to employ such methods for purposes of intercarrier compensation. As a general matter, it has not been demonstrated that a significant fraction of VoIP-originated traffic lacks geographic connection to the NPA-NXX assigned to it. In the future, technological developments may change this assessment.

25 The Proposal acknowledges that computer to phone transmissions will not have CPN information. Proposal, Appendix B, at 15. In addition, the proposal acknowledges that technological limitations may be the cause. *Id.*.

26 Proposal at 15 (discussing factors for VoIP-originated traffic).

signaling obligations and establishing a framework built upon voluntary agreements between carriers, with provisions for State-commission arbitration where parties pursuing negotiations do not reach arrangements.

Respectfully submitted,

BROADVIEW NETWORKS
NUVOX COMMUNICATIONS
ONE COMMUNICATIONS CORP. AND
XO COMMUNICATIONS, LLC

By:______________________

Brad E. Mutschelknaus
Edward A. Yorkgitis, Jr.
Thomas Cohen
KELLEY DRYE & WARREN LLP
3050 K Street, N.W., Suite 400
Washington, D.C. 20007
202-342-8400

Their Attorneys

December 7, 2006